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Supreme Court of the United States

OCTOBER TERM 1942

No. 850

Louis E. Ury,

Petitioner,

against

Moore-McCormack Lines, Inc.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF

N. Sargeant Rosenberg,
Attorney for Petitioner.

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OCTOBER TERM 1940

No.

LOUIS E. ULM,

Petitioner,

against

MOORE-MCCORMACK LINES, INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable Chief Justice of the United States and Associate Justices of the Supreme Court of the United States:

Your petitioner, Louis E. Ulm, prays that a writ of certiorari issue to review the order of the United States Circuit Court of Appeals for the Second Circuit entered on January 28, 1941, reversing a judgment of the United States District Court for the Southern District of New York. The judgment was entered upon the jury's verdict in favor of the plaintiff in an action for damages for personal injuries sustained by him while aboard the SS. "Southfolk", upon which vessel he was employed as an able seaman. The Circuit Court ruled that the case was properly submitted to the jury for determination (115 F. [2nd] 492, 493), but reversed the judgment because certain unidentified, uncertified and unauthenticated hospital records were excluded from evidence by the Trial

Judge. The Trial Judge excluded these documents because no proper foundation had been laid for their admissibility and because there was no showing that the requirements of the Federal statute had been met. The Circuit Court reversed and its ruling involves the interpretation and effect of the recently enacted Federal statute (1936)—28 U. S. C. A., 695.

Upon a petition for rehearing, filed November 26, 1940, decided January 27, 1941, Circuit Judge Clark wrote a second opinion explaining the first. Respectfully the petitioner contends that the second opinion does not eliminate the erroneous legal conclusions contained in the first. If anything, it demonstrates the lengths to which the Circuit Court went in attempting to eliminate the proper logical inferences and legal deductions which were the only ones that could have been obtained from its first ruling.

The language of the Federal statute in question (28 U. S. C. A., 695) is identical with a New York State statute (C. P. A., Sec. 374a). The highest Court of the State of New York held that records such as those in question are not admissible (*Johnson* v. *Lutz*, 253 N. Y. 124). The Circuit Court sitting in the State of New York, interpreting the identical language of the Federal statute, held they were admissible despite the Conformity Act and the decisions of this Court (*Erie R. R.* v. *Tompkins*, 304 U. S. 64; *Vandenbare* v. *Owen-Illinois Glass Co.*, decided Jan. 6, 1941).

The major question presented on this petition, therefore, is the proper interpretation of a Federal statute, which is identical in language with a State statute—that latter having been interpreted by the highest Court of the State, the constitutionality of such statute as interpreted by the Second Circuit and the limitations which must be placed upon the admissibility of unsworn, hearsay statements under the so-called modern rules of evidence.

Summary of Facts

The plaintiff, a young man twenty-eight years of age, was employed by the defendant in the capacity of able seaman on December 18, 1939, and assigned to duty aboard the SS. "Southfolk". To get from the deck to the crew's quarters it was necessary to use a companionway ladder or staircase which was in an almost vertical position, running from the main deck to the deck below. The ladder was so poorly constructed as to be insecure and was not attached either at the top or bottom, except that it was held in place by an iron pipe railing. It is difficult to describe the structure itself. Plaintiff's Exhibit 4 is a fair representation thereof. Plaintiff's Exhibit 5 indicates that there were two light fixtures in the area of the companionway. One of these was never illuminated, as it had no bulb. The other, a small light located some distance from the ladder, was out at the time of the occurrence.

On December 24, 1939, the plaintiff, in his working clothes, joined the other members of the crew in the mess hall. At about 1 A. M. he and one Robbins were proceeding from the mess hall, which was located on the aft deck, to their sleeping quarters on the deck below, to turn in for the night. Because of the defective condition of the ladder and the lack of proper illumination, plaintiff fell. He received first aid treatment and early that morning was removed on a stretcher to the Marine Hospital, where the attending physician placed him on a plank bed in a private room. He remained confined to the hospital for seven weeks. While at the hospital during these first weeks he developed a cyanosis. His entire body turned blue. He was placed in an oxygen tent, where he remained for almost a week. His condition was so critical as to warrant notification by the hospital to his family that he was expected to die. After leaving the hospital, he was forced to return and again be confined to bed for an additional five weeks, making his total stay at the hospital over three months.

The case was submitted to the jury, who returned a verdict for $25,000 on the injury action and $10,000 on the maintenance and cure action, which was reduced by stipulation to $3,000.

On appeal, various errors were assigned by the defendant-appellant, all of which were found to be lacking in merit. The Circuit Court held that it was for the jury to determine the controversy, but reversed the judgment because of an alleged error with respect to the admissibility of the records.

Jurisdiction of the Court

The order of the Circuit Court of Appeals was made and entered on January 28, 1941.

The statutory provision under which the jurisdiction of this Court is invoked is 28 U. S. C. A., 347; Judiciary Code, Sec. 240 as amended; Chap. 9 of the Judicial Code and Judiciary and the rules of this Court.

The opinion of the Circuit Court is dated November 12, 1940. On November 26, 1940, and within the time allowed by the rules of the Circuit Court of Appeals, a petition for rehearing was filed. It was not decided until January 27, 1941, on which day it was denied. A second opinion was filed on January 27, 1941. On January 28, 1941, the order of reversal and the mandate of the Circuit Court of Appeals was filed.

Questions Presented

The first question presented is whether the Trial Court properly excluded records which were unidentified, unauthenticated, uncertified, and for which no proper foundation had been laid, and whether the provisions of Section 695 of 28 U. S. C. A. authorize the admission of such records with or without the formalities as set forth by the statute, being complied with.

Secondly, whether there was any ground for the reversal of the action for maintenance and cure on which an award was made to the plaintiff and whether a new trial, if warranted, should not have been directed as to the issue of damages alone in the negligence suit.

Third, whether costs may be imposed upon a seaman in the face of the provisions of Section 837 of the Judiciary Code and the decision of this Court in *Bainbridge* v. *Merchants & Miners Transp. Co.*, 287 U. S. 278.

Reasons Relied Upon for the Granting of the Writ

1. The Circuit Court has made a decision in direct conflict with the decisions of the New York State Court of Appeals involving the interpretation of an identical statute, with the result that confusion is created on an important question of the admissibility of evidence, a question which arises daily in the trial of many lawsuits in the State and Federal courts of this district.

2. The Circuit Court for the Second Circuit has made a decision which directly conflicts with the decision of the Circuit Court for the Fifth Circuit on the interpretation of the identical Federal statute (*United States* v. *Chandler*, 87 F. [2nd] 356 [5th Cir.]).

3. The Circuit Court of Appeals for the Second Circuit has made a decision which is contrary to the letter and spirit of the Conformity Act, 28 U. S. C., 724 (*Burns Mortgage Co.* v. *Fried*, 292 U. S. 487).

4. The Circuit Court of Appeals has erroneously interpreted the Federal statute, thereby establishing a dangerous precedent and thereby overruling all previously conceived ideas respecting the admissibility of documentary evidence.

5. The Circuit Court for the Second Circuit has made a ruling which violates the constitutional provisions respecting due process. It is universally recognized that what some person said outside the court room, either orally or in writing, when not under oath is not admissible in evidence to establish a fact.

Were the rule of the Circuit Court in this case followed to its logical conclusion, then anything that anybody said in any record, made anywhere, is properly admissible in evidence without a showing as to where the records came from, where they were kept or how they were kept, and the burden shifts to the opposite party to explain the contents of said writing.

WHEREFORE, your petitioner respectfully prays that this petition for a writ of certiorari to review the order of the Circuit Court for the Second Circuit be granted.

LOUIS ULM,
Petitioner,
By JOSEPH S. ROBINSON,
Counsel for the Petitioner.